No. 16301

# United States Court of Appeals
## For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture,
*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

— and —

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, a joint venture,
*Respondents.*

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS BOARD TO ENFORCE SAID ORDER AGAINST THE KINGS RIVER CONSTRUCTORS

## INITIAL BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

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## INITIAL BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

### I. JURISDICTION

On October 17, 1958, the National Labor Relations Board entered a Decision and Order in their Case No. 20-CA-1288 against the Kings River Constructors, a joint venture, affirming the Intermediate Report and adopting the Findings, Conclusions and Recommenda-

tions of the Trial Examiner contained in that Report (Tr. 43-46). This case arose out of an alleged unfair labor practice charge in violation of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C.A. 141 (Tr. 1-7).

The petitioners, as aggrieved persons, invoke the jurisdiction of this court to review the Board's Order and vacate, set aside or modify that Order under the authority of Section 10(f) of the Act, 61 Stat. 146; 29 U.S.C.A. § 160.

Kings River Constructors were engaged in the construction of an installation in the Kings River Canyon in California, sixty miles from Fresno, at a total cost in excess of $1,500,000.00 and made purchases from outside the State of California in excess of $500,000.00 at times here material, and were therefore engaged in interstate commerce subject to the Act, all as alleged in Paragraphs II and III of the Complaint (Tr. 4, 5) and admitted by Petitioners' Answer (Tr. 7, 8).

## II. STATEMENT OF THE CASE

In February, 1952, Kings River Constructors were engaged in construction of a power house for the Pacific Gas & Electric Company of California at a place called Black Rock in the Kings River Canyon, approximately sixty miles east of Fresno, California. They maintained an office in Fresno as well as at the job site.

At the same time, there was another joint venture conducting construction referred to as the Wishon Dam, approximately twenty miles from Black Rock.

This joint venture was named Morrison, Walsh & Perini. Morrison-Knudsen Company, Inc. was the sponsoring partner of each of these ventures, although the projects were not otherwise related.

Mr. Manfred E. Tuttle (on whose behalf the Complaint was issued in this case), age 70 (Tr. 86), had been working for the past few years as a warehouse clerk, including some employment on other projects in which Morrison-Knudsen was interested (Tr. 66). He had quit work on one such project in November, 1956, and had remained unemployed while completing some dental work at his then residence in Stockton (Tr. 95, 98).

Mr. Jack Sharp was an old friend of Mr. Tuttle's and was also a construction warehouseman with whom Mr. Tuttle had worked on other jobs. At the time of the first events of this case, Mr. Sharp held a job as warehouseman with petitioners at Black Rock.

On Friday evening, February 22, 1957 (Tr. 100) Mr. Tuttle drove from Stockton to Friant where Mr. Sharp was living. This trip was a surprise visit to Mr. Sharp, as Mr. Tuttle had not previously contacted him (Tr. 99, 145). By coincidence, on the same day that Mr. Tuttle arrived, Mr. Sharp, who had been on loan from the Wishon Dam Project, was advised by the Project Manager at Wishon Dam that he was to be transferred back to that project from Black Rock. At the same time, Mr. Perkins advised Mr. John E. Atkins, Warehouse Manager at Black Rock, to get someone to replace Sharp (Tr. 136). Upon finding Tuttle at his home after returning from work that night, Mr. Sharp advised Tut-

tle of the pending transfer and suggested there might be a job opening for Tuttle in Sharp's place at Black Rock.

The next morning, Saturday, February 23, Mr. Sharp went to Fresno to see Mr. Perkins about when he was to go to Wishon, and took Mr. Tuttle along to inquire about his getting the job at Black Rock (Tr. 138). On this occasion, Mr. Perkins was anxious to obtain Sharp at Wishon and felt that the suggestion that Tuttle replace Sharp at Black Rock was all right (Tr. 139). However, it is clear that Mr. Perkins had no authority whatsoever over employment at Black Rock, where a Mr. Jack DeLay was Project Manager for the entirely different joint venture (Tr. 142, 172). The jobs did attempt to assist each other and jointly maintained a labor coordinator for procurement of personnel for both jobs at Fresno. This person's name was James Wolcott (Tr. 222-224).

On Monday, February 25, Mr. Tuttle presented himself at the Black Rock Project under the impression that Mr. Perkins was Manager there and that he would or had hired Tuttle to replace Sharp (Tr. 68). Earlier that day, Mr. Tuttle had gone to the Fresno Local No. 431 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, the union to which Mr. Tuttle belonged. Mr. Tuttle advised the union's secretary, a Mr. Al Fudge, that he had been hired for the warehouse job at Black Rock, whereupon Mr. Fudge became very angry and assertedly refused to "clear" Tuttle for the job (Tr. 73-74). Mr. Tuttle then left Fresno and went up to the job site.

On this same Monday, prior to the arrival of Mr. Tuttle, Mr. Sharp had advised Atkins that Mr. Tuttle was available and that it had been suggested that he take Mr. Sharp's place at Black Rock. Mr. Atkins at that time advised Mr. Sharp that another man had been hired for that job (Tr. 140).

Upon Tuttle's arrival, Mr. Atkins advised Tuttle that there must have been some mistake, that Mr. Wolcott had someone coming from Santa Anita for the job and inquired whether Tuttle had his name in the office. Mr. Atkins then suggested that Mr. Tuttle talk to Mr. Wolcott who was at the Black Rock job site. Tuttle advised Wolcott that he thought he had been hired by Mr. Perkins, and Wolcott advised Tuttle that a man had already been called for the job and that Mr. Perkins had no right to put a man on the job at Black Rock anyway (Tr. 76, 77).

Thereafter, Tuttle remained in the Fresno area seeking employment. He was offered a job by Wolcott at Black Rock in late March or early April, but before he was hired, the shifts on which he was to work were terminated and the warehouse crew was reduced, thereby eliminating the job (Tr. 196-197).

From these circumstances and certain other points of testimony noted in the Trial Examiner's Report and which we will discuss more fully when dealing with the argument on errors, the Trial Examiner concluded that the petitioners had refused to employ Tuttle because of an alleged failure to obtain union clearance, and therefore they had violated Sections 8(a)(1) and 8(a)(3) of the Act (Tr. 9 through 26). The Board adopted these

conclusions, entered a broad form cease and desist Order and an Order requiring offer of re-employment and granting a back pay award to Mr. Tuttle, all of which are subject to this Petition to review (Tr. 43, 46). The petitioners duly filed exceptions to the intermediate Report and recommended Order of the Trial Examiner with the Board (Tr. 28-42).

## III. SPECIFICATION OF ERRORS

That the following portions of the Trial Examiner's Report, which serve as findings and upon which his conclusions are based, are not supported by substantial evidence on the record considered as a whole:

1. Transcript 12:

"... Perkins, who had known Tuttle on prior construction jobs, advised the latter to get his union card cleared by Teamsters Local 431 in Fresno."

Insofar as it purports to find that Perkins required Tuttle to get permission from Local 431 as a condition of employment by Kings River Constructors.

2. Transcript 13:

"Following his interview with Perkins, at the latter's suggestion, Tuttle went to the Fresno office of Kings River Constructors and put his application on file with James Thomas Wolcott, the labor coordinator for both the Black Rock and Wishon projects. Tuttle testified that Perkins accompanied him to Wolcott's office, and Wolcott being occupied at the time, had Wolcott's secretary register Tuttle's application for the warehouse job at Black Rock."[3]

[3] "Perkins did not recall having accompanied Tuttle to Wolcott's office but admitted that he may have done so, and Tuttle was firm in his testimony on the point."

To the extent that this constitutes a finding the application with Wolcott was filed on Saturday and not on the following Monday, and to the Trial Examiner's reference to the firmness of Tuttle's testimony in view of his contradiction of dates, all of which are very material.

3. Transcript 14:

"Fudge did not want to accept the transfer of Tuttle's card from the Stockton local, told Tuttle that he already had more warehousemen than he could do anything with, and refused to clear him for the Black Rock job."

To the extent that this is a finding Tuttle could not get union approval of his asserted job because he was from Stockton, rather than because Mr. Fudge had already committed another man to the job in response to Mr. Wolcott's requisition.

4. Transcript 14-15:

"Atkins testified that prior to February 25 he had been advised by Sharp of the latter's transfer to Wishon, and that Sharp had recommended Tuttle to replace him at Black Rock. Atkins admitted that he thereupon requested Tuttle by name as a replacement for Sharp and testified that he made the request through Weatherman, office manager and Atkins' immediate superior—his usual procedure in obtaining warehouse personnel. Atkins also told Sharp to have Tuttle 'contact' him. He did not know Tuttle personally but knew of him because of work on prior projects. According to Atkins, there was some delay in Tuttle's reporting for the Black Rock job and in the interim the vacancy had been filled by the hiring of one Myers.

This testimony, as will be seen, is not consistent with that given by Wolcott."

In that it purports to find that Atkins knew of Tuttle's availability prior to February 25, that Atkins requested Tuttle by name as a replacement for Sharp on February 25, that he told Sharp to have Tuttle contact him on that date, and that there is any material inconsistency with Mr. Wolcott's testimony, or that Tuttle had ever been considered for the vacancy for which Mr. Myers was hired.

5. Transcript 16:

"According to Wolcott, it was after his interview with Tuttle that he was asked by DeLay, Black Rock project manager, to 'get him a good warehouseman',"

To the extent that this is a finding that Wolcott in fact knew of Tuttle's availability prior to being requested to get a warehouseman to replace Sharp.

6. Transcript 16:

"Obviously, therefore, Atkins' testimony that Myers had already been hired when Tuttle first approached him about the job, was erroneous, and why, on February 25, he should have advised both Sharp and Tuttle that the job was filled, invites speculation. Respondent's witnesses provided no explanation."

In that it purports to find that the date of actual hire of Myers on February 28 is equivalent to the date of commitment of the job to him, and that therefore the job was open when Tuttle applied for it on February 25.

7. Transcript 17:

"Despite his failure to obtain union clearance,

> Tuttle continued his efforts to obtain work at Black Rock. He repeatedly saw Wolcott but received no encouragement for future employment."

As finding that Tuttle could not get a union clearance, that such a clearance was necessary, and that Wolcott gave Tuttle no encouragement for future employment. The Trial Examiner subsequently found that Wolcott offered Tuttle employment (Tr. 18).

8. Transcript 17:

> "According to Tuttle, on this occasion Atkins also told him that *he had asked for Tuttle by name to fill the Sharp vacancy and had been advised that Tuttle was not eligible for the job because the union refused to clear him.* Tuttle further testified that Atkins told him he had called Fudge with respect to clearing Tuttle and Fudge had replied that Tuttle was not available for any job at Black Rock."

As suggesting that Tuttle's testimony in this regard is credible and as finding that Atkins had either asked for Tuttle to replace Sharp, or had called Fudge with respect to clearing Tuttle.

9. Transcript 17:

> "Leon Maples, a warehouse clerk at Black Rock, testified that he overheard Tuttle tell Atkins of his belief that Fudge was responsible for his failure to get the Black Rock job, and heard Atkins reply that he had put in a 'requisition' for Tuttle by name before Myers was hired, and that Wolcott said that Tuttle was not available."

To the extent that this constitutes a finding that Atkins requested Tuttle before Myers was hired and that Wolcott advised Tuttle was not available.

10. Transcript 18:

*"Atkins was not a reliable witness, but on the contrary was evasive, and I am reasonably certain, withheld facts within his knowledge on Tuttle's rejection as a replacement for Sharp."* (Italics ours)

As finding that Atkins intentionally withheld evidence and that such inconsistencies as existed in Atkins' testimony were caused by anything other than dim recollection of what, to him, were routine employment matters.

11. Transcript 18:

"Both Ryan and Myers were *cleared* through Local 431."

As finding that Ryan was cleared through Local 431, and as implying that union clearance was a required condition of employment.

12. Transcript 19:

*". . . Atkins, who was acquainted with Tuttle's work, asked for Tuttle by name as a replacement for Sharp. Absent an explanation of why he was not informed in the matter, contrary to Wolcott's testimony, I am convinced that Wolcott had knowledge of Atkins' recommendation."* (Italics ours)

As finding that Atkins asked for Tuttle as a replacement for Sharp by name on or before February 25, and that Wolcott knew or should have known of this alleged fact.

13. Transcript 20:

*"In the case of Tuttle, however, his recommendation was ignored or, at least, not followed, and Myers was hired instead, not on the strength of anybody's recommendation but through clearance with Fudge."* (Italics ours)

As finding that Atkins requested that Tuttle be employed on February 25, and that his recommendation was then ignored, and as finding that Myers' placement was due to any cause other than routine filling by the union of a placement request.

14. Transcript 20:

"Contrary to Atkins' testimony, and on Wolcott's testimony, *Myers had not been hired at the time Tuttle presented himself at the Black Rock project, nor later when Tuttle applied to Wolcott.* Why was Myers requisitioned for the job through the union, when Tuttle had Atkins' recommendatoin and was available? I think there can be but one answer. *Tuttle could not get union clearance and had aroused Fudge's antagonism.*" (Italics ours)

As finding in effect that the job for which Tuttle applied on February 25 had not been committed at that time, and that Tuttle was not hired because he could not get union clearance.

15. Transcript 21:

"*. . . he had requested Tuttle in the first instance and his request had been ignored.*" (Italics ours)

As finding that Atkins had made a request for Tuttle prior to the request in April which was referred to.

16. Transcript 21:

". . . his work must be deemed to have been satisfactory inasmuch as *Atkins,* who knew of his work, *requested him . . .*"

As finding that Atkins had made a request for Tuttle prior to the request in April which was referred to.

17. Transcript 21:

"Perkins advised Tuttle to clear with Fudge because this was the 'usual procedure,' and *Perkins was in a position to know.*"

As finding that Perkins required union clearance as a condition of employment, that Perkins' statements were material to a charge involving Kings River Constructors, and as finding that Perkins was in a position to know the usual procedure for Kings River Constructors.

18. Transcript 21:

"*. . . I think he (Atkins) was in a position to know and did know from experience that this (union clearance) was a customary requirement.*" (Italics ours)

As finding that Atkins was in a position to know the hiring procedure of Kings River Constructors, did know such procedure, and that in any event, his statements in this regard are admissions against petitioners.

19. Transcript 22:

"*. . . its denial of a job to Tuttle because the latter incurred Fudge's displeasure and was therefore unable to obtain union clearance, was discriminatory and violative of Section 8(a) (1) and (3) of the Act. It is so found.*" (Italics ours)

As finding that Tuttle was denied employment with petitioners on February 25, or any other time, because he could not obtain union clearance, and as finding that any conduct of petitioners was in violation of section 8 (a) (1) and (3) of the act.

20. The Trial Examiner erred in failing to find:

A. That on Friday, February 22, the need for a re-

placement for Sharp was known and forwarded through hiring procedures to Wolcott (Tr. 136).

B. That Wolcott, prior to Monday, February 25, requested a warehouseman from Fudge, who said he would get a good one (Tr. 275).

C. That this commitment was relayed to Atkins by Wolcott prior to Sharp telling Atkins of Tuttle's availability, and that for this reason Atkins advised Sharp that another man was coming for the job (See Argument Section 1).

D. That Atkins did not advise Sharp to contact Tuttle on Monday, February 25, because he had already advised Sharp that the job was filled when the matter was first mentioned and the man to fill the job was actually hired three days later, on February 28.

21. That the trial court erred in imputing to Kings River Constructors the actions and statements of Bertram Perkins, who was not an employee of this petitioner.

22. That the Trial Examiner erred in failing to disregard the testimony of John Atkins concerning hiring practices, in view of Trial Examiner's own acknowledgment that Atkins was not qualified to testify on the subject (Tr. 219-220).

23. The Trial Examiner erred in failing to sustain the following objection:

> "Mr. Smith: I am going to object to the reading from these notes as hearsay. I think Mr. Wolcott has not been presented these notes for personal inspection. He has not signed them. They do not constitute a signed statement. Mr. Schneider has not been called here as a witness to relate his conversation. I think it is hearsay."

and he further erred in ruling that it was proper to interrogate a witness wtih statements allegedly made by him but in fact prepared by a third person not in the words of the witness.

24. That all provisions of the Board's Order against petitioners are not based on supportable findings of fact, and should be vacated.

25. That the broad form of Section 1 (b) of the Board's Order is not supported by necessity shown in the record (Tr. 44).

26. That the Board erred in directing an offer of re-employment to Mr. Tuttle in view of the uncontradicted evidence and finding that a position was offered, and then abolished for economic reasons (Tr. 45).

27. That the provisions of 2 (a) of the Board's Order are contrary to law in that they are not conditioned upon the availability of a substantially equivalent position.

28. That the notice requirement of 2 (b) of the Board's Order should be vacated or modified in accordance with final disposition of the case (Tr. 45).

## IV. ARGUMENT

### 1. Trial Examiner's Entire Conclusions Are Predicated on Finding that Warehouse Manager Requested that Tuttle Be Hired at Time Tuttle First Applied for a Job, and Uncontradicted, Binding Evidence Conclusive that This Finding Is Contrary to Fact

For purposes of judicial review, Section 10 (f) of the Act provides:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." 29 U.S.C.A. § 160.

Petitioners have this provision well in mind, and it is not their purpose to reargue in this proceeding those matters upon which the Trial Examiner's findings are in fact based on substantial, although conflicting evidence. However, petitioners submit that as to the crucial findings that Mr. Tuttle's hire was recommended at the time he first applied at the Black Rock project for work on Monday, February 25, 1957, there is not only no substantial evidence to support this finding, but the evidence that Mr. Tuttle's hire was not recommended or requested on this occasion is conclusive. Yet, by his own statements, the Trial Examiner made this alleged fact the basis for an entire series of factual inferences against petitioners upon which a finding of violation of the Act is based.

We submit that the standard for judicial review particularly applicable to this case is contained in the leading case of *Universal Camera Corp. v. National L.R. Bd.* (1951) 340 U.S. 474, 95 L.Ed. 456, in which the following is quoted on page 487:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into

account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

In the findings described in Specification of Errors, No. 4, 5, 6, 8, 9, 12, 13, 14, 15, and 16, the Trial Examiner asserts as a fact that on February 25, Atkins asked for Tuttle by name as a replacement for Sharp (Tr. 18) and further concludes that Wolcott was lying when he denied knowing on February 25 of any request by Atkins for Tuttle, "absent an explanation of why he (Wolcott) was not informed in the matter, . . ." (Tr. 19).

The explanation is supplied by the testimony of the general counsel's own witnesses, Mr. Tuttle and Mr. Sharp. We refer particularly to Mr. Sharp's testimony as a disinterested witness, unemployed at the time of the hearing, a friend of Mr. Tuttle's since 1953 and the person who recommended Tuttle for the warehouse job. Mr. Sharp appeared from the record to have the clearest and most consistent recollection of events of any of the witnesses in the case.

We submit that the following chronological sequence of events, based principally on Mr. Sharp's testimony as corroborated by Mr. Tuttle and others is established beyond reasonable doubt, and any conclusion inconsistent with these facts cannot be sustained.

**Friday, February 22, 1957**

Mr. Sharp testified that on this date, while Sharp was at work on the Black Rock project, Mr. Perkins of the Wishon Dam project had advised Mr. Atkins

that he, Mr. Perkins, was ready to have Sharp back at Wishon and to get someone to replace him (Tr. 136, 137). Mr. Sharp knew all winter that he was going back to Wishon, but did not know when until that evening (Tr. 137). Furthermore, Mr. Sharp did not at that time know Tuttle was available until he got home and found Tuttle waiting. Mr. Tuttle's visit was a *surprise* (Tr. 145 Testimony of Jack Sharp):

> "Q. As a matter of fact, Mr. Sharp, didn't you talk with John Atkins some three to four days before this Monday in question—before Monday, the 25th of February, I believe the date is—didn't you talk with John Atkins concerning Mr. Tuttle?
>
> A. No. I didn't talk with him until after I came down that (96) Friday, after I talked with Bert Perkins—or Bert was there in the warehouse.
>
> Q. That is the first you knew that you would be going to Wishon—
>
> A. I didn't know whether Mac existed, even, then or not.
>
> Q. And then that Friday Mr. Tuttle's visit was a surprise to you?
>
> A. That is right.
>
> Q. And after you talked to Bert Perkins that Saturday morning, then the next morning when you went back to work up at the warehouse—
>
> A. Right.
>
> Q. You talked with Atkins about Mr. Tuttle taking your place?
>
> A. Yes, sir."

This is corroborated by Mr. Tuttle's own testimony (Tr. 99 Testimony of Manfred E. Tuttle):

"Q. Had you had correspondence or had you called Mr. Sharp in the meantime?

A. No, I never called Mr. Sharp.

Q. When did you come to Fresno?

A. I came down just to visit him because he was a friend of mine. I had known him, you know, up in that—

Q. When was that, that you first came down to visit him, after leaving Beardsley?

A. It was at the time I applied here for a job. I got down here, and he told me he was being transferred and that there would be a job up there where he was. So I applied for this one."

Obviously, Mr. Sharp could not have recommended Mr. Tuttle to Atkins on or prior to this date because (1) he did not know his job would be open until that date, and (2) he was not aware of Tuttle's availability or whereabouts.

**Saturday, February 23, 1957**

On Saturday morning, Mr. Sharp went to see Mr. Bert Perkins in Fresno to see just when Mr. Perkins wanted him to go to Wishon. He took Mr. Tuttle along to inquire about the Black Rock job (Tr. 138).

There is no testimony of any contact by either Mr. Perkins or Mr. Sharp with Atkins on this date in connection with hiring Tuttle.

The Trial Examiner (in Specification of Error No. 2 found that following the Perkins interview, on the same day, Tuttle put in an application at the Kings River Construction Office (Tr. 13). It is true that Tut-

tle so testified (Tr. 71). Although the Trial Examiner found his testimony "firm" on this point, it appears that Mr. Tuttle was even more "firm" in placing the same event on Monday, February 25:

"Q. When did you next contact the office at Kings River Constructors?

A. I went right to the office Monday morning, and I don't know whether that's the morning that Mr. Perkins took me in to Mr. Wolcott's office and told me to give my name to the clerk—(55) to give my name to the lady that was in there.

Q. Did Mr. Perkins meet you at the door?

A. He met me outside. He saw me standing out in the hall and come out of his office and took me in there.

Q. Come out of Mr. Wolcott's office?

A. Yes, that is right.

Q. What did Mr. Perkins say at that time?

A. He said, 'Register him for the job up there.' That is what he told her.

Q. He told the girl in the office at that time?

A. That is right.

Q. Did you see Mr. Wolcott?

A. Not that morning.

Q. Not that morning?

A. I didn't see him until I got out to the job. He was out on the job.

Q. Then, did you see Al Fudge that day?

A. Yes. That's the day I seen him, that day, and asked him about it.

Q. When did you see Al Fudge?

A. Before I went out.

Q. To the job?

A. Yes."

From this testimony, the witness was quite clear that the contact at Kings River Constructors Office was on Monday morning, February 25.

**Sunday, February 24, 1957**

Tuttle spent Saturday afternoon and Sunday bringings his trailer from Stockton, arriving Sunday night (Tr. 107). Again there is no evidence of any contact between Sharp, Tuttle or anyone else with Mr. Atkins in connection with Tuttle's employment.

**Monday, February 25, 1957**

On this date, for the first time, by his own testimony and as a matter of circumstantial necessity establishing the first opportunity, Mr. Sharp saw Mr. Atkins at the Black Rock job site and advised him that Mr. Tuttle was available, to which Atkins answered that the job had been filled:

> "Q. Did you have any discussion with Mr. Atkins concerning Mr. Tuttle *before the time* Mr. Tuttle arrived at the project?
>
> A. I did.
>
> Q. What was that conversation between you and Mr. Atkins, as best you can recall?
>
> A. Well, it was nothing out of the ordinary, I don't think, I just told him that at the conversation Bert and Mac and me had down at the Fresno Hotel. *And he informed me at that time that there was another man hired to take my place.*" (Emphasis ours)

*Petitioners assert that this evidence is conclusive as to when Atkins first learned of Tuttle availability.* He could not have previously requested Tuttle or known of any dispute that Tuttle might have had with Mr. Fudge of the union, sixty miles away in Fresno. Yet Mr. Atkins promptly, and at that moment, advised Mr. Sharp that he had another man coming. The other man, of course, was the warehouseman which Mr. Wolcott had requisitioned from Mr. Fudge at the request of Jack DeLay, Project Manager at Black Rock (Tr. 275). This would be in accordance with standard procedure (Tr. 199). It was known on Friday at Black Rock that Sharp had to be replaced, but no one there knew of Tutttle until the following Monday.

Tuttle arrived later at Black Rock and was advised by Atkins that Wolcott had someone coming from Santa Anita (Tr. 76). There was no mention of union difficulty in this conversation. Tuttle was referred by Atkins to Wolcott, who happened to be on the project that day, at which time the following conversation took place (Tr. 76, 77).

> "A. 'Well,' he says, 'you had better go up and see Mr. Wolcott. He is up at the office.' You know, their main office is some distance from the warehouse. And he said, 'You had better go up there and see Mr. Wolcott.' So I went up and I—we had to wait quite awhile, and finally somebody identified his car for me and I just waited outside until he came out and I talked to him out in the ? ? ??, as he was getting into his car. And he said, 'Well,' he says, 'I have already called a man for that job.' And I asked, I told him that Mr. Perkins had told

me to go up there. And he said, 'Well, I have called a man for that job.'

Q. All right. Then what happened?

A. When I asked him, he says, 'Well, Mr. Perkins has no right (21) to put a man on this job, anyway.' He says, 'He is just over at Wishon.' So I said to him, 'Well, it seems rather strange to me that a man can take a man off of a job but can't put another one in his place. He must have some authority here.'

Q. Was there any further conversation?

A. No. He says, Mr. Wolcott said, 'Well, that is the way it is. He is just over Wishon.' And from then on, well, I just left.''

There is again no mention of union clearance and it appears from the record that this was Wolcott's first contact with Mr. Tuttle (Tr. 282). According to the only evidence available, Wolcott did not learn of Tuttle's problems with Fudge until the following day, Tuesday, February 26 (Tr. 228).

As previously stated, finding that Atkins and Wolcott knew of Tuttle's application, knew that he would not be cleared by the union and had this knowledge on Monday, February 25, when the matter was first mentioned by Sharp, is essential to the inferences and conclusions from which the Trial Examiner makes his ultimate finding that Mr. Tuttle was not hired because he could not get union clearance. Such a conclusion could be reached only by completely ignoring the foregoing testimony, which neither the Trial Examiner, the Board nor the reviewing court are entitled to do under the doctrine of the *Universal Camera Corporation* case,

*supra,* and instead relying upon certain testimony of Mr. Wolcott which is inconsistent with the other evidence in the case, and particularly the evidence hereinabove set forth.

The extent that Mr. Wolcott's testimony (Tr. 274-275) tends to establish that arrangements for hiring Mr. Myers were not made until after he had been contacted by Mr. Tuttle, we believe this in part is faulty recollection and in part a confusion over the fact that Myers was actually hired on Thursday, February 28, 1957 (Tr. 262), although the call to the union which he answered was obviously made at an earlier date. He was the only person to whom both Mr. Wolcott and Mr. Atkins could have been referring when they talked to Mr. Tuttle on Monday, February 25, although Myers' exact identity was then unknown. Having once called the union for an employee, an employer is certainly not free to fill the vacancy with other applicants during the period when the union is obtaining someone to fill the position. A misunderstanding in this regard may possibly have been the cause of conflict between Mr. Tuttle and Mr. Fudge. Counsel for the Board did not see fit to call Mr. Fudge, and obtain direct evidence on this issue, but rather relied upon inference and hearsay. We submit that this court in the case of *National Labor Rel. Bd. v. Amalgamated Meat Cutters* (C.A. 9, 1953) 202 F.2d 671, has held that agency findings cannot be based upon hearsay alone. *Willapoint Oysters v. Ewing,* C.A. 9, 174 F.2d 676.

We recognize that it is unusual for the employer to suggest that his own witness is in error and that the testimony on behalf of the Board is correct, but

on this issue such a conclusion is compelled. It is quite likely that Mr. Wolcott, who is constantly dealing with new hires and personnel problems, might be uncertain as to a particular time sequence, when asked to recall the chain of events one year later. To him, it was a routine event of his work. Yet in effect the Trial Examiner has based his whole case on this one portion of testimony, notwithstanding its inconsistency with the other established facts of the case (Spec. of Error 19).

To answer the Trial Examiner's request for an explanation of why Wolcott did not have knowledge of Atkins' recommendation, the answer is that Atkins made no such recommendation.

We are aware that Mr. Atkins also testified that Mr. Tuttle had been recommended to him by Mr. Sharp approximately four days before Monday, February 25 (Tr. 186), but again, in view of the inconsistency with the testimony of Mr. Tuttle and Mr. Sharp, Mr. Atkins' testimony must be deemed in error and based upon inaccurate recollection. Mr. Atkins does recall making one requisition for Mr. Tuttle when the warehouseman, Mr. Maples, was married (Tr. 195). As a result of this requisition, Mr. Wolcott contacted Mr. Tuttle and he would have been employed but for termination of the shift by the District Manager (Tr. 196, 230, 278). It should be noted that the next opening after Mr. Myers was hired was when he left and a Mike Ryan, who had worked with Mr. Atkins for over ten years, was specifically requested by Mr. Atkins (Tr. 193, 194). The only other opening on the job was when Mr. Maples left, and admittedly Mr. Tuttle was requested for this

job, although it never materialized. Accepting petitioners' contention that Mr. Myers was requisitioned from the union before Mr. Tuttle's availability was known (Spec. of Error 20) and agreeing that Mr. Atkins' efforts to get Mr. Ryan all the way up from Los Angeles to fill the next vacancy was motivated by a particular desire for this employee, then the only job for which Tuttle could have been considered was the replacement of Mr. Maples. Consequently, to whatever extent the hearsay evidence concerning Mr. Fudge's position might be considered with reference to "clearing" Mr. Tuttle, the evidence is conclusive that Mr. Tuttle in fact was hired for the first job that became available after his application, even though it was later terminated before he actually went on the work.

**2. Legal Errors by Trial Examiner and Consideration of Unsubstantial Evidence Destroys Foundation for Trial Examiner's Findings.**

A. In Specification of Errors Nos. 1, 17 and 21, the Petitioners assign error to the consideration by the Trial Examiner of acts and statements of Bertram Perkins, on which the Examiner has made certain findings and for which the Petitioners are held responsible. Even if Perkins did tell Mr. Tuttle to clear with or through the Union, or whatever suggestion was in fact made in connection with the Union, for this to be material, Perkins would have to have been a responsible supervisor of the Kings River Constructors. *Poultry Enterprises, Inc. v. N.L.R.B.* (CA 5, 1954) 216 F.2d 798. Yet in fact, Bertram Perkins was not even an employee of Kings River Constructors. The mere fact that

the two joint ventures had common sponsoring partners does not make the parties identical. Perkins' testimony as to either usual procedure or recommendations to Mr. Tuttle should have been disregarded.

B. In the same manner, as set forth in Specification of Errors 17 and 22, the Trial Examiner finds from Mr. Atkins' testimony that Union clearance was customary, notwithstanding Mr. Smith's objection to such testimony at page 201:

> "MR. SMITH: I will object on the ground that I think the direct examination brought out, and was limited in that sense, that Mr. Atkins had no dealings directly with the union and didn't know and had no occasion to know it.
>
> TRIAL EXAMINER: I believe all he is being asked for is what his understanding of the procedure was. And what weight that would have I don't know."

The weight referred to by the Trial Examiner was sufficient in his mind to warrant reference in his opinion (Tr. 21) although he himself pointed out that there was a lack of showing of Atkins' capacity for knowledge concerning Union relationship (Tr. 219, 220) which lack was not cured.

C. In Specification of Error 3, 7, 11 and 19, reference is made to findings which are entirely or substantially based on hearsay, and unsupported by corroborating evidence. It is error to base factual findings on such unsubstantial evidence standing alone, as it does in the present case. *N.L.R.B. v. Amalgamated Meat Cutters, supra.*

As an example, in Specification of Error 3, the Trial

Examiner makes findings of fact concerning Fudge's participation in Tuttle's employment, based entirely on Tuttle's testimony.

In Specification of Error 7, the Trial Examiner finds that Tuttle failed to receive Union clearance, again based entirely on Tuttle's testimony of what Fudge said, yet Fudge was not a party for whom the Kings River Constructors were responsible, nor was he even a witness. His out of Court statements might be offered for other purposes, but they cannot be offered as proof of the truth of whether a Union clearance was granted.

In Specification of Error 18, reference is even made by the Trial Examiner to Tuttle's own self serving statement that he thought Fudge was responsible for his not getting a job.

As an example of the extent to which hearsay was used in the opinion, in Specification of Error 11 a finding is made that both Mr. Ryan and Mr. Meyers were cleared through the Union. Meyers was cleared because the Union sent him out, but the finding as to Mr. Ryan clearing through the Union is based on the following testimony of Mr. Atkins:

(Tr. 211 Testimony of Mr. Atkins)

"Q. Was Mr. Ryan cleared through the union, too?

A. I would imagine, yes, I would imagine so.

Q. That would be your impression, or there again had you —

A. He has always carried a union card."

(See also Tr. 239)

Any single one of these items might not be prejudicial, standing alone, but when used as a basis for several of the Trial Examiner's findings and when considered with the absence of direct testimony on the issues and the fundamental conflict between the evidence and the Trial Examiner's finding as set forth in paragraph 1 of the argument, it is submitted, as asserted in Specification of Errors 19 and 24 that such evidence is insufficient to support an inference of violation of the Act, and the Trial Examiner's ultimate findings are admittedly based on inference. *National Labor Relations Bd. v. Fox Manufacturing Co.* (CA 5 1956) 238 F.2d 211. The introduction of such evidence with the other evidence in the case has created a record of such uncertainty and conflict as to times and circumstances as to deprive much of the substantial evidence which does exist of probative value. As stated in Specification of Error 23, the Trial Examiner even went so far as to permit the attempted interrogation and impeachment of a witness with the use of someone else's out of Court notes, when that person was not available. The net result is the inconsistency of the Trial Examiner's findings with the Government counsel's own evidence and those facts which are clearly established.

### 3. The Form of the Board's Order Is Too Broad in Scope and Lacking in Certainty.

The permissible scope of a Board order was considered in the leading case on this issue of *National Labor Rel. Bd. v. Express Pub. Co.* (1941) 312 U.S. 426, 85 L.ed. 931. In that case, the court stated that the basic reason for restricting the scope of a Board's Cease

and Desist Order was that alleged violations of the Act, not in controversy and not similar or fairly related to the unfair labor practice found, should not be tried by contempt proceedings.

The case points out that the power to issue an injunction does not justify an injunction broadly to obey a statute, and further points out that all types of future labor relations are not to be indefinitely conducted at the peril of contempt summons. The court then established the following criteria governing the scope of a Cease and Desist Order, page 937 (L.ed.):

> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

In *May Dept. Stores Co. v. National Lab. Rel. Bd.* (1945) 326 U.S. 376, 90 L.ed. 145, the court struck from the order the phrase "in any other manner," and stated that the test was whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it from continuing to engage in unfair labor practices.

In *Lion Oil Company v. National Labor Relations Board* (CA 8, 1957) 245 F.2d 376, the court, in striking this portion of the Cease and Desist Order which constituted a blanket restraining order, held, at page 380:

> "Before such a sweeping mandate be issued, there must be evidence that the employer is guilty of consummate disregard for other provisions in the Act or that there is high likelihood of future violation."

For the same reasons this court has modified or stricken such provisions in the cases of *National Labor Relations Board v. Mason Mfg. Co.,* 126 F.2d 810; *National Labor Relations Board v. Geigy Co.,* 211 F.2d 553; *National Labor Relations Bd. v. Cowles Pub. Co.,* 214 F2d 707; and *National Labor Relations Bd. v. Lamar Creamery Co.,* 246 F.2d 8.

It would appear to be quite clear that the single incident in the present case, if it amounts to anything, certainly does not amount to a consummate disregard for the Act. Yet the Board continues to follow its standard custom of issuing a broad form order, as contained in Section 1(b) (Specification of Error 25) and supporting the order by reference to the particular unlawful labor practice found with a recitation "We believe that the respondents repeating the commission of the violation involved herein in the future may be anticipated by reason of its conduct herein" (Tr. 44) when in fact there is no reason whatsoever from the evidence or otherwise to anticipate such violation, and in any event a similar violation is restrained by paragraph 1(a) of the proposed order.

**4. Provision for Offer of Re-employment and Payment of Back Wages Should Be Conditioned on the Duration and Availability of a Position for Which Tuttle Is Qualified with the Petitioners.**

A. In Specification of Error 26, it is contended that as it appears from the record that there was no position open for Mr. Tuttle after the reduction in April, there is no basis for a present offer of re-employment.

B. As stated in the Specification of Error 27, an offer of re-employment should be conditioned specifically in the order upon the existence of an appropriate position. The Black Rock project has in fact been completed and the joint venture composed of petitioners is no longer physically operating.

## CONCLUSION

The Trial Examiner has found that *prior* to the time Sharp first advised Atkins of Tuttle's availability on Monday, February 25:

1. Atkins had requested through his supervisors that Tuttle be hired.
2. Atkins had told Sharp to have Tuttle get in touch with him.
3. Atkins had told Wolcott he wanted Tuttle.
4. Atkins was advised that Tuttle was not available for hire because the union had refused clearance.
5. Atkins' recommendation of the hire of Tuttle had been ignored.

Under any view of the evidence, the above findings simply cannot be, yet without these findings the entire

reasoning and basis for the Trial Examiner's opinion is destroyed.

For this and the other reasons set forth herein, we request an order of this court setting aside and denying enforcement to the Board's Order and Decision.

Respectfully submitted,

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